AIZUDDIN SYAH AHMAD v. PP

COURT OF APPEAL, KUCHING
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
[CRIMINAL APPEAL NO: Q-09-98-04-2017]
1 JUNE 2018

EVIDENCE: *Admissibility – Urine specimen – Requirement under s. 31A(1A) of Dangerous Drugs Act 1952 – Whether must be by police officer not below rank of Sergeant – Urine specimen collected by corporal – Whether to be excluded from evidence*

The appellant was charged at the Magistrate's Court for an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), punishable under s. 15 of the same Act. The appellant was found guilty and sentenced to a fine of RM2,500 in default of six months imprisonment as well as to undergo a police supervision for two years. The decision was affirmed by the High Court and hence, this appeal by the appellant. The complaint raised by the appellant was that the urine sample was taken by a corporal when s. 31A(1A) of the DDA requires the collection and examination of urine specimen must be done by a police officer not below the rank of a Sergeant and not by a corporal.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) It is well-established that even if evidence is illegally obtained, but if relevant, it is admissible. The court has the discretion to exclude evidence which may be prejudicial as opposed to one related to technical breach. More so, if the prejudicial effect outweighs its probative value; (*Kuruma v. R*). The court has the power to expunge irrelevant evidence at any stage of the trial. (paras 8 & 9)

(2) However, when an Act sets out a particular procedure, that procedure must be meticulously followed and common law cases could not override the provision of the Act as well as the supremacy of the Federal Constitution. In this case, there was a breach of s. 31A(1A) of the DDA and the breach could not be overcome by the principles set out in the common law case of *Kuruma v. R* as well as *R v. Sang*. A provision of criminal statute must be strictly followed, failure of which would amount to a breach of rule of law. This was a fit and proper case for the urine sample to be excluded and/or expunged from the evidence. By doing so, there would not be any incriminating evidence sufficient to convict the accused. (paras 13 & 15)

A ***Bahasa Malaysia*** *Headnotes*

Perayu dituduh di Mahkamah Majistret atas kesalahan bawah s. 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum bawah s. 15 Akta yang sama. Perayu didapati bersalah dan dikenakan hukuman denda RM2,500, jika gagal membayar, penjara enam bulan dan menjalani
B penyeliaan polis selama dua tahun. Keputusan itu disahkan Mahkamah Tinggi dan dengan itu, rayuan ini oleh perayu. Aduan yang ditimbulkan oleh perayu adalah, sampel air kencing diambil oleh seorang berpangkat korporal apabila s. 31A(1A) ADB memerlukan pengambilan dan pemeriksaan spesimen air kencing dibuat oleh pegawai polis tidak rendah daripada
C pangkat Sarjan dan bukan seorang korporal.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

D **(1)** Undang-undang matan adalah jika keterangan diperoleh secara tidak salah, tetapi jika relevan, keterangan itu boleh diterima. Mahkamah mempunyai budi bicara untuk mengecualikan keterangan yang boleh menyebabkan prejudis berbanding dengan yang berkait dengan pelanggaran dari segi teknik. Lebih-lebih lagi, jika kesan prejudis
E mengatasi nilai probatif; (*Kuruma v. R*). Mahkamah mempunyai kuasa memadamkan keterangan yang tidak relevan di mana-mana peringkat perbicaraan.

(2) Walau bagaimanapun, apabila satu-satu Akta memperuntukkan satu prosedur khusus, prosedur itu mesti dipatuhi dengan teliti dan kes-kes
F common law tidak boleh mengatasi peruntukan Akta tersebut serta keulungan Perlembagaan Persekutuan. Dalam kes ini, terdapat pelanggaran s. 31A(1A) ADB dan pelanggaran tersebut tidak boleh diatasi oleh prinsip-prinsip yang diperuntukkan dalam kes common law *Kuruma v. R* serta *R v. Sang*. Satu-satu peruntukan statut jenayah mesti
G dipatuhi dengan ketat, dan kegagalannya membentuk pelanggaran kaedah undang-undang. Kes ini adalah kes yang sesuai dan wajar untuk sampel air kencing dikecualikan dan/atau dipadamkan daripada keterangan. Dengan berbuat demikian, tiada keterangan menyalahkan yang mencukupi untuk mensabitkan tertuduh.

H **Case(s) referred to:**
Ainan v. Syed Abu Bakar & Ors [1938] 1 LNS 10 HC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
Jayasena v. R [1970] AC 618 ***(refd)***
Kuruma v. R [1955] AC 197 ***(refd)***
I *Kuruma v. The Queen [1968] 3 WLR 391* ***(refd)***
Mohd Syedol Ariffin v. Yeoh Ooi Gark [1916] 1 MC 165 ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
Saminathan & Ors v. PP [1955] 1 LNS 138 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, s. 31A(1A)
Federal Constitution, arts. 5, 8

Other source(s) referred to:
Janab's Key To Criminal Procedure Code, 3rd edn, pp 431-448

For the appellant - Firdaus Morshidi; M/s Firdaus & Co
For the respondent - Mohd Taufik Mohd Yusoff; DPP

[Editor's note: Appeal from High Court, Miri; Criminal Case No: MYY-41S(A)-1/4-2016) (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appeal raises an interesting point of law related to the Federal Constitution, s. 31A(1A) of the Dangerous Drugs Act 1952 (DDA 1952) and the common law jurisprudence related to admissibility of illegally obtained evidence. (See *Kuruma v. R* [1955] AC 197; *R v. Sang* [1980] AC 402).

[2] The appellant in the instant case was charged in the Magistrate's Court at Miri. The charge read as follows:

> Bahawa kamu, pada 03/05/2014 jam lebih kurang 2310 Hrs bertempat di Pejabat Bahagian Siasatan Jenayah Narkotik daerah Miri, dalam negeri Sarawak telah didapati memasukkan bahan dadah ke atas diri sendiri dadah berbahaya jenis Amphetamine dan Methamphetamine yang terkandung dalam Jadual Pertama Akta Dadah Berbahaya 1952 (Akta 234), tanpa kebenaran dari pihak berkuasa dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 15(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah Seksyen 15 Akta yang sama.

[3] The appellant was found guilty and had to pay a fine of RM2,500 in default of six months imprisonment as well as to undergo police supervision for two years. On appeal, the High Court affirmed the conviction and sentence.

[4] Before us, learned counsel for the appellant took up only one issue. The counsel's complaint was that the urine sample was taken by a Corporal by the name of Rasul bin Salim. The counsel asserted pursuant to s. 31A(1A) of DDA 1952, the said collection and examination of the urine must be done by a police officer not below the rank of a Sergeant and not by a Corporal. The said section read as follows:

> Section 31A. Examination of arrested person by a medical officer.
>
> (1) …

A (1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a
B reasonable period.

[5] In the instant case, there was no request to the appellant according to law for a police officer below the rank of a Sergeant to provide a specimen of his urine. The sub-section specifically requires that the request must come from the police officer not below the rank of a Sergeant.

C

[6] The learned Deputy Public Prosecutor in response says:

Any breach of the particular provision therein will not affect the admissibility of the sample taken by the police even without direct request from the police officer not below the rank of sergeant made to the
D appellant, would indicate that this provision is not mandatory but rather it is directory.

[7] The prosecution also relied on many other cases not directly on point. The learned Deputy Public Prosecutor's submission on this issue *verbatim* reads as follows:

E 1. Section 31A is only a procedural and not evidential

In *Riduan bin Masmud v. Public Prosecutor* [2015] 1 LNS 449, at paragraphs 35 and 36, the High Court decided as follows:

[35] As stated above, a DSP may authorise in writing in the prescribed form for a blood specimen from a person reasonably
F suspected of having committed an offence may be taken for forensic DNA analysis. In this case it was PW18, who was not a DSP, who had authorised for the blood specimen to be taken. Reading the Record of Appeal PW18 had not complied with the provisions of s. 12 of the DNA Act. The question is whether this
G is fatal to the prosecution's case.

[36] The provisions in the DNA Act, in particular in s. 12 and s. 13, are procedural, not evidential and do not prescribe or affect the admissibility of the exhibits or evidence thereto. If the evidence is relevant the court will admit it. It is not concerned with how it is obtained Even if the evidence is illegally obtained it is admissible
H provided it is relevant In this case, the taking of the blood specimen and the semen stains of the accused and the DNA results thereto were relevant evidence and were admissible although they might not comply with the provisions of the DNA Act: see *Public Prosecutor v. Haji Kassim* [1971] 2 MLJ 115; *Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33.

I

The prosecution submits – In order to determine any non-compliance to section 31A DDA it is very important for the court to take into consideration first the issue of the purpose of the section is merely to collect the urine sample by the police.

It is merely a procedural requirement just to collect the sample before it being sent for analysis. The urine sample is relevant to this case in order to establish a case under section 15 DDA.

What is important is the evidential value of the sample in the eye of the court and nothing else. And to determine the evidential value will be based from the result that will be made by the chemist.

It is submitted that *Riduan*'s case, *supra*, is relevant to our case. Even though it is a High Court's decision, it is a good law.

In *Public Prosecutor v. Mohamad Rasid bin Jusoh* [2009] 9 CLJ 557 the court in discussing the non-compliance in taking the urine sample had this to say:

> My other reason is as follows. Assuming, for the sake of argument, the police breached the proviso to subsection 1A in obtaining the urine specimen from an arrested person, the evidence procured thereby will be considered as improperly or illegally obtained evidence. However it settled law that in our system of justice, illegally or improperly obtained evidence is admissible provided it is relevant (see *Kuruma v. R* [1955] AC 197 and *Saminathan v. Public Prosecutor* [1937] MLJ 39).

2. The provision of section 31A DDA is only a directory not mandatory. In *Pendakwa Raya lwn. Mohd Safwan bin Husain* [2017] 5 MLJ 255 this Honourable Court at paragraph 36 decided:

> [36] Harus juga dicatat lanjut bahawa s. 31A ADB 1952 tidak menyebut di mana-mana bahawa kegagalan untuk mematuhi kehendak di situ boleh membuatkan apa jua bukti yang diperoleh hasil daripada pemeriksaan yang diiakukan akan menjadi tidak boleh diterima sebagai keterangan (inadmissible). Ini berbeza dengan peruntukan s. 113 KPJ atau pun s. 37A ADB 1952 yang memperuntukkan dengan jelas bahawa percakapan tertuduh selepas ditangkap dan tanpa diberikan kata-kata amaran tidak boleh diterima sebagai keterangan (inadmissible).

The prosecution submits – Any breach of the particular provision therein will not affect the admissibility of the sample taken by the police even without direct request from the police officer not below the rank of sergeant made to the appellant, would indicate that this provision is not mandatory but rather it is directory.

The prosecution submits – The fact that there was no challenge to any of the prosecution's witness that the urine sample was not his shows that the appellant was not prejudiced at all by the alleged non-compliance.

The prosecution submits – The fact that PW8 was with PW3 who was instructed by PW8 himself to escort the appellant to collect his urine sample is sufficient to show that the appellant should have been required by PW8 to give his urine sample for the purpose of the offence under section 15 DDA.

The prosecution submits – The purpose of section 31A is to preserve the evidence if the medical officer could not do it in a practicable time. The key word in the section is 'preservation of evidence'. Therefore, in our case, the preservation of the urine sample is intact. On, the evidence also, there was no challenge by the appellant that the urine sample taken was not his sample. In fact, at the defence stage, he had admitted that he had given his urine sample.

The prosecution submits – We submit based on the above submission, the correct principle of law is that non-compliance of section 31A(1A) of the DDA will not automatically illegalise the process of taking the sample. The matter that is crucial for this Honourable Court to take into consideration is whether the said urine sample is relevant or not to this case. The answer is in the positive. Since the answer is in the positive, the non-compliance will not affect the admissibility of the urine sample to be tendered during the trial.

Jurisprudence To s. 31A(1A), Federal Constitution And Case Of *Kuruma v. R*

[8] It is well established in Malaysia following the common law case of *Kuruma v. R* as well as *R v. Sang*, that even if evidence is illegally obtained but if relevant, it is admissible. The jurisprudence advocated in *R v. Sang* was meticulously followed by our apex courts. In *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134, the Court of Appeal stated that:

> The court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. Therefore, the evidence relating to the blood sample taken from the accused was admissible as it was relevant even if it was taken without his consent. (See *SM Summit Holdings Ltd & Anor v. PP* (1997) 3 SLR 922)

[9] It is equally important to note that court has discretion to exclude evidence which may be prejudicial as opposed to one related to technical breach. More so if its prejudicial effect outweighs its probative value. (See *Kuruma v. The Queen* [1968] 3 WLR 391). The 'fairness rule' advocated by the Federal Court in *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507, gives the court the discretion to exclude prejudicial evidence. The court has also the powers to expunge irrelevant evidence at any stage of the trial.

[10] *Kuruma*'s case can only be relevant if there is no governing statute to say how the evidence must be procured. In *Mohd Syedol Ariffin v. Yeoh Ooi Gark* [1916] 1 MC 165, the court stated that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction is varied or denied the effect. (See *Ainan v. Syed Abu Bakar & Ors* [1938] 1 LNS 10; [1939] MLJ 209).

[11] In *Jayasena v. R* [1970] AC 618, the Privy Council did not follow the common law where it differed from the Code. The Privy Council stated that the common law is malleable to an extent that Code is not. In *Saminathan & Ors v. PP* [1955] 1 LNS 138; [1955] MLJ 121, Buhagir J observed:

English decisions serve as valuable guides and indeed are binding authorities where the English law has been followed in meaning of particular words are of little or no assistance when those words have been specially defined in the Ordinance.

[12] In Malaysia, the Federal Constitution is supreme. Common law cases are subject to the Act as well as the Federal Constitution. The Constitution gives protection to the accused pursuant to arts. 5 and 8 which reads as follows:

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

8(1) All persons are equal before the law and entitled to the equal protection of the law.

[13] When an Act sets out a particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act as well as the supremacy of the Constitution.

[14] In the instant case, the Act specifically states how the evidence must be procured. Courts however, on many occasions have thrown out evidence when it was obtained in breach of specific provision of the Act. For example, confessions statement under s. 113 of the repealed Criminal Procedure Code. (See *Janab's Key To Criminal Procedure Code*, 3rd edn, pp. 431 to 448).

[15] We have read the appeal records and the able submission of learned counsel for the appellant as well as the learned Deputy Public Prosecutor. After giving much consideration, we took the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) In the instant case, it is not in dispute that there was a breach of s. 31A(1A) of DDA 1952. The said breach cannot be overcome by the principles set out in the common law case of *R v. Karuma* as well as *R v. Sang*.

(b) A provision of criminal statute must be strictly followed failure will amount to breach of rule of law.

(c) This is a fit and proper case for the urine sample to be excluded and/or expunged from the evidence. By doing so, there will not be any incriminating evidence sufficient to convict the accused.

[16] For reasons stated above, the appeal is allowed. The conviction and sentence are quashed. The fine which has been paid is to be refunded to the appellant.

[17] We hereby ordered so.